Representing minors can be challenging but also provides an opportunity for attorneys to assess how well the clients communicate with people who are not lawyers and make sure that the client is an engaged part of the legal process. When working with minors and those with mental health concerns, attorneys should begin assessing the client's understanding of the process early on. If possible, obtaining a recent report card or assessment from the school or information about education supports may assist in this determination. Knowing how a minor performs in reading or writing courses in school may offer some insight into the client's ability to understand the process and written documentation, including the representation agreement and releases of information. Attorneys should consider the minor's reading level when drafting written communication and utilize tools available in many software programs to assess the reading level of such documents. Attorneys can also use visual tools, such as highlighting and underlining, to help minors focus on the most important information in a document. This strategy is particularly helpful if there is a date or location the client needs to remember.

Once an attorney has a basic idea of the client's capacity to interpret and comprehend written and oral communications, attorneys should become familiar with the client's communication styles. Asking the client to explain the situation or restate information covered in a meeting may assist in setting terminology for future meetings. Developing shared terminology will assist in making sure that the client actually understands what is going on rather than simply agreeing with words that have no meaning for them. Shared terminology may mean learning the slang terms the client uses so the attorney can help connect the slang to the legal terms or helping the client to learn new ideas and connect them with the lawyer's language.

Minors and those with mental health challenges might have trouble picturing the court process, no matter the communication efforts made by the attorney. Attorneys may consider reaching out to court staff to schedule a time to take a minor client through the actual courtroom they will appear in if that will be a part of the case. Visualizing the space and seeing the room may assist the minor in being more comfortable with the logistics of the case so that part might be less confusing or traumatizing. Taking the meeting out of a conference room or off the phone may assist the client in analyzing the process and is a good opportunity for some role playing to assist in understanding.

The key to effectively creating and protecting the attorney-client relationship when the client is a minor, especially when mental health concerns exist with the client, is clear communication. Taking the time early on to establish understanding of terms, the legal process, and communication preferences will ensure that the client is represented the most effectively as the case progresses.

III. Civil Commitments of Minors [§ 5.7]

Minors in Wisconsin may, in certain circumstances, be unable to remain in their homes and require civil commitment. A civil commitment is the process for the state to restrict an individual's liberty on the basis that the individual requires treatment or care for specific mental health, development disability, or substance dependency issues. The goal of such commitments is to protect the individual or others from harm. Steve McCarthy, Wis. Legis. Council, Issue Brief, *Civil Commitment* (Oct. 2019), https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/health_and_mental_health/ib_civilcommit_sm_2019_10_01.

Wis. Stat. ch. 51 provides the guidance for voluntary and involuntary commitments, including treatment and rehabilitation of adults and children with mental illness, developmental disabilities, or alcohol and other drug abuse or dependencies. An involuntary civil commitment for adults and children requires certain elements: imminent dangerousness based on acts that the person is committing that will likely lead to self-harm or harm to others; the dangerousness is believed to be caused by a mental illness;

and there exists a substantial probability that death, serious physical injury, debilitation, or disease will imminently ensue unless the person receives prompt adequate treatment. Wis. Stat. § 51.20(1)(a). The individual in question must be mentally ill, developmentally disabled, or drug dependent, capable of rehabilitation, and dangerous as defined by statute. *Id.*

➢ ***Note.*** A proper subject for treatment must mean there are techniques that can be employed to bring about rehabilitation from the condition. *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179.

A minor may also be the subject of a voluntary commitment, though not without the consent of a parent or guardian. Wis. Stat. §§ 51.13, 51.61(6). If the child is under the age of 14, the minor is not required to consent, only the parent or guardian. If the child does make a statement or exhibit conduct that indicates the minor does not agree to the admission to the facility, it must be noted on the face of the application. Wis. Stat. § 51.13(1)(a). If the minor is age 14 or older, the minor and parent must consent to the voluntary commitment. Wis. Stat. § 51.13(1)(b). The only exception to requiring parental consent for voluntary treatment is for minors 12 years old or older seeking treatment for abuse of alcohol or other drugs. Wis. Stat. § 51.47(1).

Involuntary civil commitments of minors can be initiated in three ways: (1) an individual who was voluntarily admitted to a treatment facility is later denied their request for discharge, (2) a petition for civil commitment is prepared by the county corporation counsel and signed by three adults (also known as a three-party petition), or (3) a law enforcement officer detains an individual on the basis of observed behavior or reliable witness accounts. Wis. Stat. § 51.13 (specifically regarding minors, referencing Wis. Stat. §§ 51.15, 51.20, 51.45). All three types of involuntary commitment require an emergency detention petition be filed with the circuit court. The emergency detention petition then forms the basis for a probable cause hearing.

The quickest route to initiate commitment proceedings is through law enforcement emergency detention. Law enforcement officers may do an emergency detention of individuals alleged to be mentally ill when the subject poses a significant risk to themselves or others as established by behavior observed by the officer or reliable witness accounts. The officer must file a statement detailing the basis for detention, identify any witnesses to the behavior, and allege that the officer believes the individual meets the criteria for commitment. Wis. Stat. § 51.15(1), (2), (5).

A three-party petition for examination requires three adults to sign the petition for involuntary commitment. The petition must state a belief that the subject of the petition is mentally ill and in need of treatment and support it with specific examples of statements or acts by the individual to support that belief. The petition must indicate a concern that the subject is a danger to themselves or others, including threats or attempts at suicide. For a sample form for the three-party petition, see Marathon Cnty., *Questionnaire–Mental Illness*, https://www.co.marathon.wi.us/Portals/0/Departments/CRP/Documents/3PartyPetitionMIQuestionnaire.pdf (last visited May 6, 2021).

Once a civil commitment proceeding is initiated, there are two court hearings to complete the action. The first hearing, known as the probable cause hearing, must be held within 72 hours after the petition is filed. Wis. Stat. § 51.20(7). A probable cause hearing requires the subject of the action to be detained and transported to a facility until the hearing. The petitioner must testify before the court and may be cross-examined by the subject's attorney. If probable cause is found after the hearing, the subject will be evaluated by court-appointed examiners and wait in a facility for the second hearing, known as the final hearing.

The final hearing usually occurs within 14 days after the probable cause hearing. Wis. Stat. § 51.20(9), (10), (13)(e). The final hearing may be a jury trial and, in the case of a three-party petition, include testimony from all three petitioners. After the final hearing, if the subject is committed, they must be treated in the least restrictive environment consistent with their needs. For some minors, this may include return to the parent or guardian for outpatient care, though there is no minimum commitment time a court is required to order for inpatient treatment. The initial order for commitment cannot exceed six months. Renewal orders cannot exceed one year.

IV. Confidentiality and Release of Records—Limits and Concerns [§ 5.8]

A. In General [§ 5.9]

Minors are the subject of a variety of records that may be at issue in the course of representation in civil and criminal court and even in cases in which the minor is not a party to the case directly. Different types of records are subject to different laws and are protected differently.

B. School Records [§ 5.10]

Educational records are protected by both federal and state law. 20 U.S.C. § 1232g; Wis. Stat. § 118.125. The Family Educational Rights and Privacy Act, commonly known as FERPA, protects a minor from the school disclosing educational records to someone other than the minor's parent or guardian until the minor reaches the age of majority. 20 U.S.C. § 1232g. Educational records can be requested by the court system for civil or criminal proceedings.

FERPA protects the release of the pupil records from general disclosure, but schools can disclose the records without written consent in certain circumstances, including if the disclosure is to comply with a judicial order or lawful subpoena, is in connection to a health or safety emergency, or is to state and local authorities within the juvenile justice system as required by state law. 34 C.F.R. § 99.31. A subpoena is only sufficient for release of pupil records for law enforcement purposes and does not include a subpoena issued by a defendant in a criminal case. 20 U.S.C. § 1232g(b)(1)(J)(ii); Wis. Stat. § 118.125(2)(q)3.

The records can be released for review by a court prior to release to the state and defense in a criminal proceeding in response to a subpoena from a defendant in some circumstances. Wisconsin courts have not interpreted the federal statute, but courts interpreting FERPA have held that a defendant in a criminal case must first make some showing of need before issuing a subpoena. 20 U.S.C. § 1232g(b)(2)(B); *People v. Bachofer*, 192 P.3d 454, 460 (Colo. App. 2008); *Zaal v. State*, 602 A.2d 1247 (Md. 1992).

Interestingly, FERPA does not specifically allow minors who are separated from their parents the rights normally afforded to the parents and otherwise eligible students. 34 C.F.R. § 99.5(b); U.S. Dep't of Educ., *Frequently Asked Questions*, https://studentprivacy.ed.gov/frequently-asked-questions (last visited May 6, 2021). Schools may use their discretion in determining whether an unaccompanied minor is responsible enough to exercise the privileges afforded under FERPA, such as reviewing records and consenting to their disclosure.

C. Medical Records [§ 5.11]

Generally, medical records for adults and minors alike are protected by the Health Insurance Portability and Accountability Act (HIPAA). 42 U.S.C. § 1320d. HIPAA is a federal act intended to